

Wellington Hall Nursing Home, Inc. and 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board and David Jarvis.
Cases 22-CA-10108, 22-CA-10238, 22-CA-10384, and 22-CA-10192

August 17, 1981

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND ZIMMERMAN

On April 6, 1981, Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and brief¹ and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.²

The Administrative Law Judge found, *inter alia*, that there is sufficient circumstantial evidence to conclude that the Respondent knew of the union activities of employees Morris, Goldsmith, and Jarvis, and that the Respondent violated Section

8(a)(3) and (1) of the Act by discharging them because of those activities. Alternatively, he concluded that, even absent such knowledge, the Respondent discharged these three employees in order to provide an aura of legitimacy to its contemporaneous discharge of a number of known union activists. We agree that the discharges of Morris, Jarvis, and Goldsmith were part of the unlawful action taken against the known union activists, whether or not the Respondent was aware of the activities of Morris, Jarvis, and Goldsmith. As the Administrative Law Judge properly found, the discharge of each of these employees shared the pattern of pre-textual explanations the Respondent gave for all the discharges effectuated within a brief period immediately following the renewed union activity in the plant. Having found that the asserted explanations were false, the Administrative Law Judge was justified in inferring that these explanations were manufactured in order to conceal the Respondent's antiunion motivation. *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966); *St. Anne's Home, Division of DePaul Community Health Center*, 221 NLRB 839, 847-848 (1975). The finding of an unlawful motivation does not depend on the Respondent's knowledge that each of the discharged employees was engaging in union activity where, as here, the Respondent's entire pattern of conduct bespeaks an attempt to crush the Union, an attempt in which Morris, Jarvis, and Goldsmith were caught up and swallowed. *Hedison Manufacturing Company*, 249 NLRB 791, 794, fn. 13 (1980), *enfd.* 643 F.2d 32 (1st Cir. 1981). See also *Rea Trucking Company, Inc.*, 176 NLRB 520, 525, fn. 5 (1969), *enfd.* 439 F.2d 1065 (9th Cir. 1971).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wellington Hall Nursing Home, Inc., Hackensack, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ We find no merit in the Respondent's contention that it was prejudicial error for the Associate Chief Administrative Law Judge to deny its motion for an extension of time to file a post-hearing brief with the Administrative Law Judge. The Respondent's motion for an extension of time was not filed until January 15, 1981, after the expiration of the time set by the Administrative Law Judge for the filing of briefs. The motion states that the Respondent's substituted attorneys were advised on January 14, 1981, that the previous attorney had not filed a brief, but does not state why the substituted attorneys, who were retained on December 23, 1980, were unable to ascertain this fact for 3 weeks. Moreover, the Respondent's brief in support of its exceptions adequately presents its position with regard to the issues before the Board. The Board has reviewed the record, the exceptions, and the brief, and finds that the Respondent has not been prejudiced by its failure to file a brief with the Administrative Law Judge.

² We find no merit in the Respondent's contention that it should not be ordered to offer reinstatement to certain employees to whom it states it offered reinstatement after the close of the hearing herein. As the facts surrounding these alleged offers of reinstatement have not been litigated, their effect on the remedy ordered here is properly part of the compliance stage of this proceeding. Similarly, we find no merit in the Charging Party Union's contention that the remedy should be expanded to include an award of litigation and organization expenses to the Charging Party Union and litigation expenses to the General Counsel. The General Counsel has not joined in this request. We find such remedies appropriate only when a respondent raises defenses so insubstantial as to be patently frivolous, or in other exceptional circumstances not present here. *M. A. Harrison Manufacturing Company, Inc.*, 253 NLRB 675 (1980); *Eastern Maine Medical Center*, 253 NLRB 224 (1980). Cf. *J. P. Stevens and Company*, 247 NLRB 420 (1980), and 239 NLRB 738, 772-773 (1978).

Member Jenkins would provide interest on any backpay due in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT issue written warnings or evaluations or discharge any of you for supporting 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, or any other labor organization.

WE WILL NOT promulgate or maintain any rule, regulation, or other prohibition against employees who solicit or distribute handbills or similar literature on behalf of any labor organization on our nursing home premises in other than immediate patient care areas, or similar literature on behalf of any labor organization on our nursing home premises in other than immediate patient care areas, during employees' nonworking time.

WE WILL NOT institute and maintain a procedure to solicit bargaining unit grievances and to adjust bargaining unit grievances, without giving 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, an opportunity to be present at the adjustment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind any rules restricting the areas and times in which employees may solicit or distribute handbills or similar literature on behalf of labor organizations as they apply to times other than working time and to areas other than immediate patient care areas.

WE WILL offer Usil Figaro, Sandra McCadney, Paula Morris, Lois Wells, David Jarvis, Elizabeth Foley, Helena Goldsmith, Virginia Hall, and Annie Thomas immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and reimburse them for the pay or other benefits they lost as a result of our discriminatory action, plus interest.

WE WILL rescind and expunge from all our files all copies of the written warnings issued to Virginia Hall on June 26 and August 13, 1980, Helena Goldsmith on June 26, 1980, and Annie Thomas on July 13, September 19, and October 25, 1980, and the written evaluations issued to David Jarvis on June 20, 1980, Paula Morris on June 21, 1980, and Elizabeth Foley on June 27, 1980.

Our employees are free to become or remain or refrain from becoming or remaining, members of 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board.

WELLINGTON HALL NURSING HOME,
INC.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: These consolidated cases were heard before me in Newark, New Jersey, on December 10 and 11, 1980,¹ upon a second amended consolidated complaint, herein called complaint, issued against Wellington Hall Nursing Home, Inc.,² herein called Respondent or Home, on November 28. In a series of charges and amended charges filed by 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, herein called Union, on June 24 (Case 22-CA-10108), July 3 (first amended charge in Case 22-CA-10108), August 29 (Case 22-CA-10238), October 30 (Case 22-CA-10384), and November 19 (first amended charge in Case 22-CA-10384), and a charge filed by David Jarvis on July 30 (Case 22-CA-10192), upon the basis of which the second amended consolidated complaint issued, Respondent is alleged to have issued written warnings to three named employees, issued written evaluations to three other named employees, and to have discharged these six and three other named employees, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act; to have unilaterally changed work hours of certain employees and to have issued a warning to an employee who protested the change and to have unilaterally administered a grievance procedure³ without notice to or prior negotiations with the Union as certified and exclusive representative of its full-time and regular part-time service and maintenance employees, including licensed practical nurses and all clerical employees, other than business office clerical employees, in violations of Section 8(a)(1) and (5) of the Act; and to have issued and maintained an overly broad and impermissible no-solicitation, no-distribution rule in violation of Section

¹ All dates hereinafter shall refer to 1980 unless otherwise noted.

² Upon motion filed after closing of hearing seeking substitution of Respondent's counsel, by my order dated January 28, 1981, the law firm of Murray, Granello & Kenney was substituted as counsel for Respondent in place of Hugh P. Husband, Esq., who had tried the case.

³ This allegation was added by way of oral amendment granted prior to the close of hearing on December 11.

8(a)(1) of the Act. All of the conclusionary allegations of violation of the Act were denied by oral answer made by Respondent's then counsel at the opening of the hearing.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel,⁴ I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, is engaged in providing and performing health care services and related services at its principal office and place of business located in Hackensack, New Jersey, where it maintains a nursing home as its sole health care facility. It annually receives gross revenue valued in excess of \$100,000 and goods valued in excess of \$50,000, which goods are transported to its place of business in interstate commerce directly from States of the United States other than the State of New Jersey. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. STATUS OF THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and the History of Respondent's Proceedings Before the Board*

On October 1, 1976, in Case 22-RC-6410, the Union was certified as exclusive collective-bargaining representative of all employees of Respondent in the following unit:

All full-time and regular part-time service and maintenance employees, including Licensed Practical Nurses and all clerical employees other than business office clerical employees, employed by the Employer at its Hackensack, New Jersey location, but excluding all Registered Nurses, professional employees, guards and supervisors as defined in the Act.

The certification followed a rerun election ordered by the Board after it had set aside the original election on the grounds of Respondent's improper interference. Respondent's objections filed to alleged improper union conduct during the course of the second election campaign were ultimately dismissed by the Board which issued the certification approximately 1-1/2 years after the Union filed its petition.

Subsequently, upon a charge filed by the Union in Case 22-CA-7269 alleging alleged discharge of union activists as well as a refusal to bargain, a settlement agreement was entered by all parties on March 15, 1977, providing for backpay for five employees, who waived reinstatement, and an undertaking by the Home to recognize and upon request to bargain collectively with the Union in the certified unit under a 1-year extension of the initial certification year. The agreement contained a non-admission of violation of the Act by Respondent. Thereafter, starting on April 5, 1977, when the Home refused to supply the Union with addresses of the then unit employees,⁵ the Union filed a new charge in Case 22-CA-7619. On February 7, 1979, over Respondent's exceptions and supporting brief, the Board issued a Decision and Order (240 NLRB 639), affirming the rulings, findings, and conclusions of Administrative Law Judge Thomas A. Ricci and adopting his recommended Order. The affirmative portion of that Order required Respondent to furnish to the Union a written list of the names and addresses of all unit employees and to bargain in good faith with the Union. That order was enforced in full by a judgment of the Court of Appeals for the Third Circuit dated December 5, 1979, which recounts that it had granted the Board's motion for judgment by default on October 10, 1979.

Another proceeding was instituted before the Board when Respondent unilaterally increased paid sick days, holidays, and starting wage rates and improved vacation and jury duty leave policies, effective July 2, 1978, and unilaterally assigned certain work tasks to, and discharged, on December 21, 1978, an active union employee for refusing to perform them. Upon a complaint issued on the Union's charge in Cases 22-CA-8779 and 22-CA-8948 alleging these acts as violations of Section 8(a)(1), (3), and (5), Administrative Law Judge Harold Bernard, Jr., issued a Decision on September 28, 1979, recommending that the Board find Respondent violated its bargaining obligation under Section 8(a)(5) of the Act by the unilaterally formulated and implemented employment benefits but that the Board also dismiss the allegations of violation of Section 8(a)(1), (3), and (5) in the case of the discharged employee. By *pro forma* order dated November 15, 1979, in the absence of any exceptions having been filed, the Board adopted those findings and conclusions and ordered the Respondent to comply with the terms of the recommended order, including a requirement that it cease and desist from unilaterally granting or implementing improvements or changes in the benefits described or other employment benefits without first notifying and according the Union an opportunity to bargain about such matters or otherwise refusing to bargain in good faith with the Union as the exclusive bargaining agent of its employees. This Board Order was also enforced by a judgment of the U.S. Court of Appeals for the Third Circuit dated October 2, 1980.

The instant group of charges include in Case 22-CA-10108 an allegation that Respondent, since on or about June 9, 1980, has refused to bargain with the Union by refusing to meet and negotiate a collective-bargaining agreement and engaging in conduct designed to undermine the status of the Union as bargaining agent. That allegation was not incorporated in the consolidated com-

⁴ By order dated January 28, 1981, Associate Chief Administrative Law Judge Edwin H. Bennett denied Respondent's motion for an extension of time to file a post-hearing brief.

⁵ The record establishes a high rate of turnover among unit employees, a large proportion of it consisting of voluntary separations.

plaint but rather forms the basis for a civil contempt proceeding against Respondent which the Board instituted in the U.S. Court of Appeals for the Third Circuit by a petition dated December 5, 1980, including a proposed order to show cause why Respondent and its attorney and bargaining representative, Hugh Husband, should not be adjudged in civil contempt for violating and failing and refusing to comply with the court's judgment entered on December 5, 1979, earlier described.

With respect to the instant allegations in the complaint, a separate proceeding was instituted by the Regional Director for Region 22 on behalf of the Board in the U.S. District Court for the District of New Jersey, Civil Action No. 80-3207, for a temporary injunction pursuant to Section 10(j) of the Act, pending the final disposition of the matters involved pending before the Board in this case. Hearing in that proceeding was held on November 10 and 13, 1980, before District Judge Vincent Buino and the transcripts thereof as well as certain documentary evidence have been received in evidence as joint exhibits in the instant case by stipulation of the parties. That proceeding resulted in an order by Judge Buino filed November 18, 1980, granting "In Part and Denying In Part Temporary Injunction." Because of the priority nature of this case, I received the full cooperation of all counsel in an effort to expedite the hearing. To that end, an early briefing schedule was arranged and the preparation of this Decision has been given priority consistent with the requirements of the Act.

B. The Renewed Union Activity

As noted, it was not until the end of 1979 that the Union's request for names and addresses of unit employees, successfully resisted by Respondent since mid-April 1977, finally resulted in a circuit court judgment enforcing the Board's order requiring the Home to furnish the Union such a list. The list was ultimately furnished on April 4, 3 years after initial request. Since 1975, when the Union's drive among the Home's employees commenced, there had been a 100 percent turnover among them.

Alex DeLaurentis, union vice president, was hospitalized for a considerable period of time between April 4 and June 2. Upon his return to work, by letter dated June 9, DeLaurentis wrote all employees at their home addresses inviting them to a meeting to be held on Monday, June 16, from 1 to 6 p.m. at a location not far from the Home for the purpose of welcoming them into the Union's rank and discussing the contract demands to be presented to management. The letter also referred to the recent court decree and thanked the employees for their support and patience over the years. On the same date, June 9, DeLaurentis also wrote Respondent requesting a meeting on June 18, 19, or 20 at a convenient location near the Home facility for the purpose of negotiating a collective-bargaining agreement. On June 12, Respondent, in confirmation of a telephone conversation, informed DeLaurentis in writing that June 18, 19, or 20 was unacceptable and suggested June 23, 24, or 25. DeLaurentis, in a telephone call to Respondent's bookkeeper, Kathleen Morrow, on June 19 or 20, advised that June 25 at the Howard Johnson in Saddle Brook at 3

p.m. was acceptable, and also requested that the Home make available the negotiating committee (previously selected at the June 16 employee meeting) consisting of Lois Wells, Elizabeth Foley, Virginia Hall, Usil Figaro, Annie Thomas, and Sandra McCadney without loss of pay. Respondent confirmed the meeting date in a letter dated June 20, and DeLaurentis sent a telegram to Respondent confirming the scheduled meeting as well as his request for the release of the employees named, listing their scheduled work shifts. The meeting never took place⁶ and the events relating thereto and subsequent events are the subject of the proceeding instituted by the Board to hold Respondent and Husband in civil contempt of the circuit court judgment, *inter alia* requiring Respondent, upon request, to bargain in good faith with the Union.

The union-employee meeting took place on June 16 as scheduled. Approximately 15 employees attended. The employees previously named were selected as members of the Union's negotiating committee and DeLaurentis provided the employees with copies of the notice which the Board required Respondent to post as part of the affirmative remedy in *Wellington Hall Nursing Home, Inc.*, 240 NLRB 639 (1979), as enforced by the Third Circuit Court of Appeals, to distribute to fellow employees and to check on its posting at the Home.⁷

In the period from June 20 to October 25, Respondent warned, evaluated, and discharged the employees whose allegations comprise the heart of the complaint.

C. The Acts of Alleged Discrimination and Interference With Protected Rights

1. Elizabeth Foley

Elizabeth Foley was employed by the Home as a nurses aide in August 1978. In October 1979 she was appointed a senior aide. This latter job entailed greater responsibility and is a more responsible position. This appointment was made in spite of Foley having received a warning slip dated July 31, 1979, for absenteeism on eight separate occasions from January to July 1979.

After becoming a senior aide, Foley received only compliments on her work from various nurses and her supervisory nurse, Rose Raleigh. Her periodic evaluations were generally good.

Foley told a number of employees that she intended to attend the June 16 union meeting. She worked the 7 a.m. to 3 p.m. shift. Before leaving for the meeting, while still at work on June 16, at or about 2 p.m., Supervising Nurse Raleigh called her to the side and said Mrs. Baretta (Bette Baretta, director of nursing) had instructed her to give Foley a verbal warning regarding Foley's absence from work on May 27.⁸ Raleigh said that since she

⁶ In fact, since the Union's certification by the Board on October 1, 1976, no negotiation meetings had been held to the date of close of the instant hearing on December 11, 1980.

⁷ None of the employees who checked found the notice posted. Respondent asserts that by mid-June it had completed the posting period, having posted for longer than the required 60 days, from January 18 to June 5.

⁸ Baretta described this failure to report as an "absence on a holiday." Actually, it was the Tuesday following May 26, Monday, Memorial Day.

Continued

was a senior aide she should set a better example for the other aides. On May 27, Foley's car would not start and she did not get in to work. Nothing was said to her by supervision thereafter until June 16.⁹

At the union meeting, Foley was selected as one of six members of a negotiating committee. Foley also took copies of the notices which DeLaurentis distributed as previously described. On June 17, Foley passed copies of the notice around to other employees during her work shift. She also passed copies out to other employees in the dining room and talked to other employees about the union meeting.

On Friday, June 27, at work, Foley was told to report to Raleigh. Foley saw her at 3 p.m. Raleigh said that she had prepared a "special evaluation" for Foley because she was a senior aide. Although the Home employed three other senior aides who were appointed when Foley was, Foley was unaware of any of them having received such an evaluation, and Respondent failed to present any such evaluations during presentation of its defense. None of them attended the June 16 union meeting. Foley read the evaluation, noticed it was negative in several respects,¹⁰ and asked Raleigh, "How did you get this dirty job?" Raleigh replied that she did not know. Foley asked if she was being fired. When Raleigh replied, "Yes," Foley said she thought she and other employees were being penalized for supporting the Union and that was why they were being fired. Raleigh just smiled and said that she did not know. Foley asked for a copy of her evaluation, received it, and left. Foley has not worked for the Home since that date. The evaluation is alleged as discriminatory in the complaint.

According to Respondent's employee policy manual then in effect, "excessive absence or lateness or failure to notify your supervisor will affect your performance rating." Also, the Home's administrator, Ronald Squillace, and Baretta both testified that, if an employee receives three warnings within 1 year, the employee is terminated. Baretta acknowledged that Foley had only received two written warnings, that the verbal counseling did not constitute such a warning although Raleigh had written a note regarding the counselings but had not shown it to Foley. As to the note, although Raleigh listed six different absences, only the last one, that relating to Foley's car problem on May 27, was discussed with her at the time of the counseling on June 16. With respect to the second written warning, that of May 28,

Baretta testified in Federal court that she had handed the warning to Foley, yet the warning slip, contrary to normal practice, neither contains Foley's signature nor a statement that she refused to sign. Then, during the instant hearing, Baretta contradicted this testimony. She now swore that although she had prepared the slip (and signed it) she did not remember giving the warning to Foley. Foley swore that she never received it. The alleged warning dated May 28 in fact duplicated the very subject matter—Foley's absence on May 27—which constituted the basis for the verbal counseling she received on June 16. If she had already received a warning, what purpose would be served by reviewing the same event with her 3 weeks later? I conclude that the May 28 warning was not prepared in the regular course or given to Foley when Respondent initially contended. Thus, Foley was fired after no written warning received during the 6 months' service in a responsible position to which she had been assigned after more than a year of satisfactory, even superior, performance as an aide.

Respondent contends that her warning coupled with her poor evaluation led to Foley's discharge. At no time did Respondent consider a demotion or other recourse against Foley for her limited absenteeism but rather fired her within 11 days of her attendance at the union meeting and her selection for its negotiation committee and within a 10-day period from the time her distribution of the employer notice and discussions of the meeting were held on Respondent's premises.

2. Lois Wells

Lois Wells was employed as a nurses aide from May 1977 until June 22, 1980, when she was fired. Wells, a college student, worked weekends and at breaks during the school year and full time during the summer. She had worked full time since May 1980. Wells received the union meeting notice and spoke to other employees about her intention of going and encouraged others to attend. At the June 16 meeting she was elected one of the members of the negotiating committee whose names were supplied to Respondent in DeLaurentis' telephone call of June 19 or 20 and confirmed in writing by the June 20 mailgram.

Wells was not scheduled and did not work on June 17 and 18. Wells worked June 19 and spoke to other employees that day about the employer notice which she had not seen posted. Wells was absent from work on June 20 with an upset stomach. On June 22, at or about 2:30 p.m. (a half-hour before her quitting time) she was called into Baretta's office. Baretta informed her she had spoken to Wells once before about absenteeism and she was going to have to terminate her for that reason.

According to Wells, only once before had her absenteeism come up. In November 1979, when working weekends she had asked Baretta if she could work full time in December and January during her college vacation. When she had not heard from Baretta, Wells called and learned that her request had been declined because

Thus, application of Respondent's policy of an automatic warning for a holiday absence in this case seems questionable at best. The written policy in this regard notes that three such notices will result in termination. Foley and other employee witnesses who testified about the written policy creditably denied ever receiving a copy of the policy or being made aware of it.

⁹ As will be seen, *infra*, Baretta was then aware that the Union had scheduled a meeting with employees to prepare for negotiations to be held between 1 and 6 p.m. at a hall near the Home.

¹⁰ In addition to the regular employment evaluation form which contained evaluation scores running from good to below average for various criteria, the evaluation contained a separate sheet providing detailed explanations of certain alleged deficiencies. Foley recalled that among three earlier evaluations, although the first had some negative aspects she did not recall, the next two were good in all respects. From Respondent's failure to provide any but Foley's special evaluation or dispute this testimony, I infer that the earlier evaluations were good ones.

of too much absenteeism.¹¹ Wells was surprised by this response at the time because her prior evaluations had not indicated any problem with attendance. Her recollection was that she had not missed more than 2 days in any month and was usually not absent at all or only one day in any given month.

Under Respondent's sick leave policy, employees are entitled to 10 paid sick days per year, provided they notify their supervisor of their absence as far in advance as possible before the start of their shift. Respondent presented no evidence that Wells' absence for illness on June 20 exceeded this amount or otherwise violated the policy.

The sole written warning Wells received, on June 21, is dated June 20, the date of her illness, and notes as the offense: "Absenteeism part-time employee—totally undependable. Can no longer use as fill in weekend." It lists six absences in calendar 1979, four in 1980, and only seven within the year prior to her June 21 discharge, including one in April and one on June 6.

In spite of Respondent's apparent failure to follow its own policy requiring three written warnings before discharge or providing 10 paid sick days per year, Baretta asserted that Wells was a part-time employee not entitled to all of the benefits of full-time employees. The policy manual in effect provides as follows concerning them:

Permanent part-time employees play an important role as the full-time staff in providing continuity of patient care. Therefore, good attendance and punctuality are just as important for part-time employees. Permanent part-time employees are entitled to all policies and procedures covering full-time employment, with adjustment in salary and benefits prorated to the agreed on schedule. Part-time employees also earn seniority rights.

Baretta was unable to explain this seeming conflict between her statement and the policy manual. Neither was Baretta able to indicate at what point an employee such as Wells who had worked full time since May and would continue full time until September received full-time status. Even as a part-timer, on a *pro rata* basis, Wells was entitled under Respondent's policy to something more than a notice contemporaneous with her discharge. Baretta's reliance on Wells' claimed unreliability, her frequent disruption of the schedule and previous warning about absenteeism, none of which was supported by memoranda or any other probative evidence,¹² cannot be

¹¹ Baretta characterized this response to Wells at the time as a "warning . . . that if her absenteeism was not corrected, she would be terminated." The exchange clearly did not constitute a written warning. As far as constituting a warning at all, it was only a response to a request for extra work. Baretta in her testimony in Federal court contradicted the above characterization appearing in her Federal court affidavit, when she swore that Wells had received only one warning and that on June 20, 1980. I credit Wells' denial that she had ever been warned about her absenteeism prior to June 21, 1980, the day of her discharge. Other than December 1979 and January 1980, Wells had worked full time on all other school breaks and vacations.

¹² During the hearing Respondent did not introduce or examine Baretta to provide any concrete support for the conclusionary allegations contained in Baretta's Federal court affidavit.

credited. As noted, Wells' discharge came on her second workday following the Union's June 16 meeting and a day following mailgram notice to Respondent of her union committee status.

3. Paula Morris

Paula Morris worked from March 28 until June 21 as a nurses aide. Prior to her employment by the Home, Morris had worked for six months at another nursing home in Hackensack; she told this to Baretta when she was hired.

After receiving the Union's June 9 letter, Morris talked to numerous employees about the scheduled meeting. Morris attended, and at one point asked DeLaurentis what the employees should do if they got hassled by management for any reason. DeLaurentis sought to reassure the employees that they had nothing to fear about losing their jobs. Morris asked DeLaurentis how the employees got representatives. He said they could appoint them there or later. Morris then said she would like to appoint Foley and Wells as representatives from the 7 a.m. to 3 p.m. shift they all worked. Foley and Wells accepted immediately.

The next day, June 17, at coffeebreak at 9:30 a.m., Morris went to the cafeteria with the notice. She showed it to another employee and explained the events of the meeting. That employee took the notice and returned it to Morris an hour later. On that day and the next, Morris talked to several fellow employees about the meeting on coffeebreaks and lunchtime.

Four days later, on Saturday, June 21, Baretta called Morris into her office at or about 3:15 p.m. Baretta told her that she was supposed to be on a 90-day probation, her evaluation was up, and her work was not up to par and she was being let go. After Morris left the office, she met Usil Figaro who had also just been fired. Both then returned to Baretta and asked for a written statement of why they were fired and Morris asked for a copy of her evaluations. Baretta told them to come back on Monday.

Morris returned on Monday, and asked Baretta for the statement, evaluations, and her check. This time, Baretta told her that "we don't give out copies of anything or written statements. If you want your paycheck, come back on payday. If you need a reference, get the other people to call me and I'll take care of it." Before she left Morris told Baretta she knew her work had been up to par, she had lied and Morris knew why, Baretta had fired her.

Morris never received a written warning and only once was she verbally reprimanded for a minor infraction. Morris stated she performed her work well, plus she helped other aides out and did extra work. Morris' only evaluation is dated June 28, 90 days after her hire on March 28, but 1 week after her discharge. It is alleged as discriminatory in the complaint. It is signed by Supervising Nurse Raleigh, who prepared Foley's "special" evaluation. It contains 6 good, 31 average, and 13 below average scores on a variety of topics relating to grooming, personal attitudes and characteristics, and work performance.

Baretta stated that Morris had no nursing home experience. This conflicts with Morris' testimony, which I credit. Baretta concluded that Morris was not capable, yet was unable to testify whether Morris was ever told that her performance was not up to par prior to the day of her discharge. Contrary to the Home's employee policy manual, at the end of Morris' 90-day probationary period her supervisor did not review her work or discuss her performance with her. Neither is there any evidence that Respondent, as required by the manual, informed Morris during her probation what standards of performance applied to her work. In fact, 1 week short of the completion of her probation, without prior warning or notice, Morris was summoned to the director of nursing and fired.

4. Usil Figaro

Usil Figaro, a nurses aide employed on the 3 to 11 p.m. shift, worked from September 10, 1979, until her discharge on June 21, 1980. She attended the June 16 union meeting, arriving at 2:30 p.m. with another aide. Figaro learned from DeLaurentis and the other union members there that the Union had been trying to get into the Home for 4 years and, since the court had approved its status, bargaining would commence. The employees were warned that, if the Home found out they had gone to the meeting, they might harass or even fire them. Figaro and the others asked questions about wages, raises, and working conditions. Figaro stayed until 6 p.m. because she was off that evening. She was selected as one of the bargaining representatives from her shift. She understood her job was to be talking to other employees on her shift, writing down what they wanted at negotiations and giving it to the Union. On her return to work, Figaro showed employees the notice to read and discussed the meeting as well.

On April 7, Figaro received her first written warning because of not coming to work on April 6, Easter Sunday.

On June 10, Figaro was out sick, she called in at 2:15 p.m. and spoke to Mary Cronin,¹³ a supervisory nurse. Cronin told her to call Baretta. Figaro then called Baretta, who told Figaro all right, come to work tomorrow. The next day, June 11, Lillian Lilly, supervisory nurse, gave her a warning slip when she arrived at work. It noted excessive absenteeism and was checked second warning. The slip also showed eight absences since January, and that verbal counseling was given by Lilly. Figaro refused to sign and told Lilly she would not sign until she spoke to Baretta because she knew Figaro had been out sick. A day or two later, Figaro spoke to Baretta. According to Figaro, she said, "I spoke to you so you don't have to give me a warning slip." Baretta told her the warning was just a reminder about how many times she had been out and asked if she had a paper to prove she had been at the doctor's. Figaro said no. Baretta said next time she should get one.¹⁴ Figaro then said

she would get one for this time. Baretta said, "No, it's o.k., just get one for next time." Figaro then signed the warning slip.

Figaro reports that she had never previously received an oral or written warning about any of her prior absences; she always called in when out sick and sometimes brought in a doctor's note.

Figaro continues that, on June 21, the day after Respondent received the mailgram listing her among union negotiating committee members for whom DeLaurentis sought paid release time, she was called into Baretta's office at 2:50 p.m. Baretta said she was sorry she had to let Figaro go, but she had to find somebody who was more responsible about coming to work; she said Figaro had been away from her work too much. Figaro asked how many times she had been away from her job. Baretta replied 8 days in 9 months. Figaro's file was in front of her. Figaro said she had come to see Baretta several days earlier about a warning slip she received on June 10 for her absence that day. Baretta said, "Yes, but now I have to let you go." Figaro asked why she had not been fired on June 10. Baretta said she had just looked over the file again and had seen Figaro had been out too many times.¹⁵ Baretta added, "I'm sorry, I've done everything for you." This statement had reference to a 2-week leave of absence Figaro had been granted at her request in October 1979, to see her daughter in Trinidad in February 1980.

As earlier noted, after Figaro left she met Paula Morris and both returned to see Baretta who, in reply to the employees' joint request, said she would leave written statements as to the reasons for their discharges on her desk for them on the following Monday.

On Monday, June 23, Figaro returned and was told by Baretta that she could not give such a statement, that she did not give a letter to anyone she fired. When Figaro asked why she had not said that on Saturday, Baretta replied, "Well, that's the way I work."

Baretta disputes this narrative. She denies she told Figaro that the second warning was just a reminder or advised Figaro that her absence was all right. Baretta states that, when Figaro came to see her about the second June 10 warning, it was on or about June 19. After Figaro signed the warning slip, while discussing her absenteeism she became irate. The argument became more boisterous and Baretta terminated her on the spot. The warning slip contains Baretta's own handwritten note which was not there when Figaro signed it. It states: "6/19/80 threatening, insubordinate during counseling. Terminated at that point. B. Baretta." Baretta testified that she did not give Figaro a third written warning for this claimed insubordination. She characterized Figaro's conduct as argumentative when Baretta was discussing Figaro's absenteeism, hollering and shouting, creating a disturbance, and loud noise. Her attitude and behavior were bad. When pressed further under cross-examination, Baretta agreed that Figaro had disagreed with her as to whether she should receive a warning. Baretta could not remember any specific words Figaro used.

¹³ Misspelled "Corona" in Figaro's Federal court affidavit received in evidence.

¹⁴ In addition to providing employees with 10 paid sick days per year, the manual notes that a doctor's certificate must be presented upon return of sick leave of 3 days or more, not 1.

¹⁵ Recall that the warning slip had listed the prior absences.

Baretta denied that Figaro had cursed. She also agreed that the home had a formal grievance procedure, described in its employee policy manual, which authorizes an employee with a problem to present the matter to her department head upon arrangement with the employee's immediate supervisor. Baretta acknowledged that the policy permitted Figaro to come to her and complain. Baretta nonetheless maintained that Figaro's attitude during the presentation of the complaint was so bad she was terminated on the spot. Although Baretta could not recall what Figaro said, she noted that Figaro was argumentative because she was complaining about the Home's policy and procedure of warnings and absences, and the fact that she did not feel she deserved a warning. The following testimony was given:

- Q. (Mr. Cestare) . . . She was argumentative?
 A. (Bette Baretta) Yes.
 Q. Because she disagreed with you the fact that she got a warning, is that it?
 A. Not necessarily.
 Q. Well, what necessarily? What was she so argumentative about?
 A. Our whole policy and procedure of warnings and absenteeism.
 Q. So that was what she was complaining about, the fact that she didn't feel that she deserved a warning, is that right?
 A. Yes.
 Q. And that made her argumentative, is that right?
 A. Yes.
 Q. For that reason she was insubordinate?
 A. Yes.
 Q. Because she complained that she should not have received a warning, she was argumentative and therefore insubordinate?
 A. Yes.
 Q. And therefore she was terminated on the spot, immediately?
 A. Yes.
 Q. And yet you only have two warning notices in the file, is that right?
 A. Yes.
 Q. And the policy is to have three warning notices?
 A. Yes.

Figaro was soft-spoken, direct, and responsive in her testimony. She denied that any dispute arose during her meeting with Baretta and that everything was very calm and low-keyed. It appears that the meeting between the two may have taken place as late June 19 rather than June 12 or 13 as Figaro recalled. In all other respects, I credit Figaro's version of the series of incidents and conversations. Baretta's lack of recall cannot be reconciled with her characterization of a transaction of such seeming importance as a serious insubordinate act calling for immediate discharge without notice. Baretta's assertion that Figaro would have been intemperate *after* she had been sufficiently mollified to sign a warning slip which she initially believed was unwarranted is not credible. Baretta's later recollection about the exit interview with

Figaro that there were people in the hall outside her office where the altercation with Figaro was taking place but her continued inability to relate Figaro was criticizing what about the Home's policies and Baretta's administration of these, is unworthy of belief.

5. Virginia Hale

Virginia Hale was employed as a nurses aide from June 18, 1979, until August 27, 1980, when she was discharged. Hale volunteered at the June 16 meeting to be a member of the union negotiating committee. She was elected, along with Figaro, to represent employers on the 3 p.m. to 11 p.m. shift. Hale's name was among those given to Respondent as members of the union committee.

Hale had received a written warning on October 22, 1979, for tardiness on seven occasions earlier that month, varying between 3 and 4 minutes. Hale had received permission to be off without pay the week of March 24 to March 28, 1980, to be with her hospitalized daughter in Washington, D.C. Before she left, Baretta told her that, if she had to stay out longer, just call and let her know and it would be all right. Hale could not get back to work on Monday, March 31, and Baretta approved by phone her request that morning to be with her daughter another day and report for work on Tuesday. Hale also missed work on Friday, April 4, Thursday and Friday, April 10 and 11, and because of illness. She called in before work each day and Baretta told her to come back "when you're better." On Hale's return to work the following Monday, she gave Baretta a note a doctor had given her. Then on June 26 (the complaint date having been amended), Hale received a second warning, alleged to be discriminatory. In it Hale is charged with excessive absenteeism. The dates listed are March 31 (the day Hale extended her visit to her daughter with Baretta's approval), April 5 (probably reflecting Hale's illness in early April which Hale recollected as being on April 4), and May 1 and 2, almost 2 months before the warning. The warning was signed by Raleigh and reflects a verbal counseling on that date by Lilly.

Finally, Hall received a third warning dated August 13 (also corrected as to date in the complaint). This warning charges excessive tardiness on six occasions in July and August, two of 6 minutes' duration, one of 5 minutes, one of 2 minutes, and two of 1 minute including the last on August 9. Hale went to see Baretta. Hale said she was usually early but some days she has trouble finding a parking spot so was a few minutes late. According to Hale, Baretta told her she should not worry about it. Respondent had to give her the warning and it was just routine. Hale asked if she was going to be fired and Baretta said no.

On August 27, when Hale came to work, her supervisor, Raleigh, told her that Baretta had told her to tell Hale that she was being terminated. Hale asked why and was told because of her being late and absent too frequently. When Hale said Baretta had told her the warning received for lateness was just routine Raleigh said there was nothing she could do, and Hale left.

Hale's annual evaluation, dated June 18, 1980, made just prior to Respondent acquiring knowledge of her

union involvement, is superior. Almost all of the 50 topics are graded good, including, *inter alia*, dependability, attendance, "notifies when unable to come to work, and reports to work promptly," and two are graded excellent. Only five of Hale's attributes were graded average and none received a poorer grade (below average or poor). The evaluator, nurse Lilly, commented: "Performs her duties well. Is kind and generous to the patients." Hale compared herself favorably to a number of other employees she named who regularly report for work later than Hale but none of whom attended the union meeting or supported the Union.

Baretta maintained that the three warnings warranted the discharge. In addition, Hale received a verbal counseling concerning the messy way she and another aide had handled a special assignment involving trash on June 26, 1980.

6. Sandra McCadney

Sandra McCadney was employed as a nurses aide from March 12 to June 21, 1980, when she was discharged. McCadney worked the 11 p.m. to 7 a.m. shift along with Annie Thomas, another alleged discriminatee. Thomas told McCadney about the letter notifying of the union meeting. McCadney wanted to attend but had other plans for that evening. She told Thomas she would be willing to serve on the negotiating committee. At the meeting both McCadney, *in absentia*, and Thomas were selected as committee members for their shift.

On June 21, the day after it received notice of her status as committee member by union mailgram, Respondent wired McCadney that she was fired: "Due to your continued absenteeism during your probationary period." McCadney's probation concluded on June 12. On that date, shortly before her election to the union committee, she received her evaluation, which rated her attendance as average. Average grades predominated with some good grades included. None was poorer than good. The evaluator's comments note: "Miss S. has shown improvement in nursing care of patients, performance, attitude, tone of voice and tactfulness. Attendance needs improvement." Nowhere does the evaluation contain a recommendation of discharge based on attendance. McCadney's discharge within days of the evaluation denied her the opportunity of improving her attendance.

Baretta points out that McCadney was absent 12 times during her 3-month probation. Yet, as noted, her evaluation did not reflect a below average or poor attendance, only that it needed improvement. McCadney was absent on June 20 because she could not get a ride to work. (She was afraid to take the bus because of an incident of attempted theft of her purse and mugging while walking from the bus stop to the Home the evening of June 16.) McCadney called in at 9:30 p.m.—an hour and a half before her starting time—to report she could not work that night because of lack of transportation. McCadney also had been upset because a new aide, named Bolton, had cursed her and argued with her on June 18. Bolton thought that McCadney and other aides should do a particular assignment Bolton had been given. On June 19, Bolton started in with McCadney again. Shortly after punching in, McCadney asked another aide, Robinson, to

inform Supervising Nurse Kitty Lee that she would not work that night because Bolton was harassing her and McCadney punched out and left. McCadney stated that she was also absent about 3 or 4 consecutive days in May with the flu. When McCadney returned to work thereafter, nurse Lee sent her home after she showed a temperature of 102. McCadney states that other named employees with whom she worked were absent more than she was yet they were not fired.

Baretta relies in part on McCadney's failure to comply with the Home's policy requiring 4 hours' notice of an intended absence prior to the start of the employee's shift. But that policy is not included in Respondent's employee manual. It is set forth in on single page of nursing department rules. Yet, all employees questioned, including McCadney, testified they were unaware of the rule and had not been supplied with a copy. Respondent, admittedly, did not supply the manual or other Home materials to employees until after the completion of their probationary period and then only on an employee's request.¹⁶

7. Helena Goldsmith

Helena Goldsmith was employed as a nurses aide from approximately September 24, 1979, until June 30, 1980, when she was discharged. Goldsmith, after receiving the Union's June 9 letter, took it to work and showed it to other employees. She did not attend the June 16 meeting but she is very friendly with Foley and the other main supporters of the Union. Goldsmith asserts, and Respondent did not dispute, that it was well known at the Home that she was friendly with those on the negotiating committee and that she supported the Union. She openly spoke with other employees on her shift about the Union, during their lunch break.

On June 26, Goldsmith was given a warning slip for excessive absenteeism by her supervisor, Raleigh. The slip noted 5 days she was absent, the last being May 5. For three of the days listed in March, Goldsmith had brought in a doctor's notes and given them to Baretta. Goldsmith told Raleigh that she did not think she was excessively absent. Raleigh told her that if she had any complaints she should see Baretta about them. When Goldsmith approached Baretta later in the day, she was advised to see her on Monday.

On Monday, June 30, Goldsmith was called into Baretta's office at 2:50 p.m. just 10 minutes before the end of her shift. Baretta told her she was terminated because of excessive absenteeism. Goldsmith asked why she was being punished now, because she had not been absent since May 5. Baretta replied she had a lot of paperwork and was just now getting around to it. Goldsmith added she reminded Baretta she had a doctor's note for 3 of the 4 days.¹⁷ Baretta said she did not care how many doc-

¹⁶ An orientation checklist, noting new employee receipt of "Personnel Policies" seems to be inconsistent with Baretta's testimony in this regard. The orientation list does not resolve the question of distribution of a single sheet of rules and I credit the consistent denial of the employees.

¹⁷ The statement was not clarified. Recall that Goldsmith was absent 5 days. It may have referred to the fact that the May 5 absence was due to illness, but Goldsmith had not produced a doctor's note for that day. Yet, the manual requires a doctor's certificate only for a sick leave of 3 days or more.

tors' notes she had, she was running a business and Goldsmith was terminated. Baretta did not dispute Goldsmith's attributing these remarks to her. Before Goldsmith punched out and left she asked Baretta for a copy of her doctor's notes but Baretta would not give them to her.

Goldsmith had received two earlier warnings. The first was received on October 28, 1979, for leaving rooms untidy and the second was issued April 7, 1980, for excessive tardiness. In neither of Goldsmith's two prior evaluations was any adverse comment made regarding attendance, which was marked good.

Baretta attributed any time lag in issuing Goldsmith her third warning to a bureaucratic delay, later explained by her as the lapse of time after the close of a pay period before the payroll secretary or supervisor discovers a pattern of absenteeism or tardiness and brings it to her attention. Interestingly, Baretta illustrated this delay by referring to a time period of less than a week, running from the close of a pay period on a Saturday to the following Monday, Tuesday, or even later in the week before she is able to get the work of review completed. The delay in Goldsmith's case between the last absence and warning was close to 2 months. Recall also that the third warning which triggered Goldsmith's discharge, and which is alleged as discriminatory in the complaint, is grounded on five absences over 9 months, three of which were authorized under Respondent's sick leave policy because they were supported by doctor's notes.

8. David Jarvis

David Jarvis worked as an orderly from January 28, 1980, until his discharge on June 9. Jarvis spoke to many of his coworkers and encouraged them to attend, during break and lunchtime at the Home. Jarvis attended the June 16 meeting and afterward spoke about the meeting with other employees during breaks at the Home. Jarvis testified without objection about a conversation he held with a licensed practical nurse named Barger a couple of days before June 16, on that occasion, in the nurse's cafeteria. Barger had a copy of the Union's letter inviting employees to the meeting scheduled for June 16. Jarvis had received information that Barger had shown Baretta a copy of the letter. Jarvis asked Barger if she had. Barger said she did show Baretta the letter.

Jarvis received a very high rating on his end of probation evaluation in April.¹⁸ He scored excellent on 39 items, good on 10, and average on only 1. His evaluator noted as follows:

Mr. Jarvis is a concerned and extremely dedicated worker. He has an excellent manner and gives all the best of care. He works well with others and is always on the go—taking on extra tasks without being asked. I consider him a very valuable employee and am very pleased with his performance.

In early May, Jarvis was suspended for 1 week after being informed by Baretta that an aide had complained to her that he had been insubordinate. Jarvis could not

place any such incident but, when he sought information as to the identity of the aide or the nature of the complaint, Baretta refused to supply any facts. Jarvis never received anything in writing relating to the suspension. After Jarvis returned, Baretta asserts she placed him on a renewed 2-month probation, but she did not inform Jarvis of this status.¹⁹

Thereafter, Jarvis recalled missing 2 workdays. Once he missed work when visiting his nephew in the hospital. Another time, on a Sunday in late May or early June, he overslept well past the start of his shift and called in sometime after the shift had started to say he would not be in. After missing the Sunday, Raleigh gave him a written warning dated May 17, listing four absences, the last two, May 10 and 18, on which there was no call, and told him to be careful about his attendance. Jarvis states he was not absent thereafter until his discharge on June 23 which followed by 1 week his attendance at the union meeting.

On June 23, Jarvis was called into Baretta's office. She informed him that he had been reevaluated after 6 months' employment. Jarvis knew of no other employee receiving such an evaluation. Baretta said that, because his reevaluation was poor, the Home had no more need for his services and he was being terminated. Jarvis asked to speak to his union representative about this and Baretta said she knew nothing about the Union. Jarvis said, "I see you're getting rid of all of us," and Baretta said she knew what she was doing. Jarvis thereupon left.

The reevaluation is alleged in the complaint as discriminatory. It was poor, in startling contrast with Jarvis' evaluation 2 months earlier. The 50 entries are split between average and below average, with a half dozen good ratings and 3 poor ones. Baretta claims that because of the additional absences she observed she requested Jarvis' supervisor to furnish her with an additional evaluation prior to the end of his renewed probation period. Contrary to Respondent's normal practice, this reevaluation is undated and there is no record evidence as to when Baretta sought it. Respondent has not supported with any testimony or warnings any of the entries other than the one relating to failure to notify when unable to come to work (for which Jarvis received his one poor grade). In particular, although Baretta claims Jarvis had additional absences after the May 17 warning, she produced no record of any verbal counseling or written warning relating to them. The failure to produce such records is the more surprising because Jarvis, on renewed probation, was being monitored closely during this period.

9. Annie Thomas

Annie Thomas had previously worked for the Home before her rehire as a nurses aide on March 28, 1980. She was discharged on October 25, 1980. Thomas worked the 11 p.m. to 7 a.m. shift, mostly on weekends, Fridays through Sundays. She was elected at the June 16 union meeting as one of the members of its negotiating commit-

¹⁸ The evaluation was reviewed with Jarvis on April 9, before the end of the 90-day period.

¹⁹ Jarvis creditably denied he had ever been so informed prior to his discharge and Baretta did not claim that Jarvis had been previously advised.

tee, and Respondent received notice of this fact on June 19.

Thomas received four written warnings in all. The first is dated June 26, shortly after Respondent learned of Thomas' union status, but was not given to Thomas until July 13 when she refused to sign. This warning is alleged as discriminatory by the General Counsel in the complaint. Among five absences listed is one, June 29, which is 3 days after the date of its preparation. The fourth absence immediately preceding June 29 is June 1, yet Respondent delayed until June 26 the preparations of the warning. Furthermore, this initial warning is dated 2 days before Thomas' initial 90-day evaluation and 10 days after Thomas reviewed and signed it. Thus, Thomas had four of the five recorded absences at the time her evaluator graded her average in attendance, good in most other qualities, and excellent in a few. Her evaluator added the comment: "Mrs. A. Thomas renders good nursing care to patients. She is subordinate and always willing to help others."

The second warning is dated September 14 and reads: "Instructed to stay till 7:30 a.m. due to staff shortage. Left after Report. Excuse unacceptable." It also notes that Thomas refused to sign it on September 19. Again, this warning is alleged as violative of the Act.

According to Baretta, when she started as director of nursing early in 1978 she established a policy applicable to all shifts requiring employees to remain up to one half hour beyond the normal end of their shifts until their duties were completed, reports had been given, and the employees on the next shift appeared. At the time, Baretta did not advise the Home's administrator, Squillace, to notify the Union of this intended change in work hours.²⁰

On the same date, September 19, that Thomas was given the warning and refused to sign she submitted a handwritten memorandum to Baretta concerning remaining on the floor until 7:30 a.m. In it Thomas described as an untruth the warning slip's statement that she had refused to remain on the floor the prior weekend (Sunday, September 14). Thomas also stated that "due to the fact that Mrs. Martin stated that you said I must remain on the floor until 7:30 a.m. in the mornings, it's impossible for me to work on Sundays anymore (I can still work on Fridays and Saturdays). The reason is school is now open and my husband leaves at 7:00 a.m. and my oldest daughter leaves at 7:30 a.m. This will automatically leave my 5 year old home alone." Thomas next referred to her receipt of the warning from nurse Lilly²¹ and concluded,

²⁰ The General Counsel alleged this policy adoption in par. 13 of the complaint as a unilateral change concerning only the hours of employment of night-shift nurses aides made between September 12 and 19, 1979, in violation of Sec. 8(a)(5) of the Act. Par. 17 of the complaint relies on the alleged unilateral change in alleging the September 19 warning to Thomas as discriminatory. Even if the policy allegation may be deemed to refer to the year 1980 rather than 1979, and thereby avoid the fatal defect of time bar because alleging conduct occurring more than 6 months prior to the filing of the charge, General Counsel has failed to rebut the only evidence of the date of the policy's establishment and thus the record facts do not overcome the statutory time bar applicable to this unilateral change instituted in 1978. With respect to the warning, I shall examine the issue relating to it independent of the lack of merit as to the claim of its alleged unilateral issuance.

²¹ Par. 7 of the complaint refers to her as Lilly.

"If leaving a 5 year old home alone is unacceptable then I wonder what is acceptable." Baretta testified that she never asked Thomas about her claim that her refusal to remain at work up to 7:30 a.m. on September 14 was not true, although they talked with each other on September 19 about the requirement that Thomas remain, if necessary, for the additional half-hour on a daily basis, and that she, Baretta, had no way of knowing whether, in fact, Thomas stayed that evening. Yet, Baretta relied on this warning, among others, in terminating Thomas the following month.

In a second 6-month evaluation of September 7, Thomas continued to receive predominantly superior ratings. The evaluator's comments reiterated the earlier ones and added, "She is expected to be more serious when on duty. Otherwise entirely reliable."

Then, on October 25, Thomas received two written warnings, both of which she refused to sign. On one, for excessive absenteeism, 5 days are listed, including 3 days (April 26 and May 10 and 17) covered by the June 26 warning. This left two absences over a period of approximately 4 months. With respect to them, Baretta was unable to testify whether or not Thomas had called in prior to the start of her shift or whether, with respect to any of the seven absences for which she received two warnings, Thomas had been sick.²² The other warning was for excessive tardiness—five separate latenesses over a 7-month period.²³ I conclude that as alleged these two warnings as well as the earlier two issued to Thomas were discriminatorily motivated in violation of the Act.

On the basis of these four warnings, the circumstances concerning their issuance having been described, and in spite of the positive evaluations she had received characterizing her as an "entirely reliable" employee, Thomas was discharged on October 25.

10. The alleged unlawful no-solicitation/no-distribution rule

As earlier noted, Respondent reprinted a preexisting employee policy manual and since on or about April 30, 1980, has maintained in effect the following rules as part of that manual:

Disciplinary Action:

If performance or attitude is not satisfactory, the employee will be talked with and encouraged to improve. For conduct such as the examples listed below, it may be necessary for your supervisor or department head to take other action—ranging from

²² As a regular part-time employee, Thomas should have been entitled to a *pro rata* portion of the 10 paid sick days a year allowed full time employees. Baretta testified that while the Home's administration did not think in terms of prorating paid sick leave for part-timers they would be prorated but she did not know how many they received—"the bookkeeper take[s] care of that." She knew how the Home prorated holiday time, permitting permanent part-time employees 5 or 6 hours instead of a full 8 hours per vacation day. Yet, incredibly, Baretta admitted she did not take into account any of Thomas' absences attributable to sickness in determining that her absences were "excessive."

²³ The warning notes that Thomas was also late reporting for duty on November 4, 1980, 11 days after her discharge and a weekday.

a verbal and/or written reprimand to suspension without pay or discharge.

* * * * *

Conduct that is detrimental to the Home's operations or that detracts from its good reputation, or that is detrimental to safe, pleasant working conditions, such as:

* * * * *

4) Posting or removing any material on Home's property, distributing written or printed matter of any kind, or solititing employees for any purpose unless specifically authorized

Solicitations:

For your protection, as well as that of our patients, private business such as buying or selling merchandise, etc., is not allowable within the Center.

Likewise, soliciting or canvassing subscriptions, contributions, memberships in organizations, etc., is not permitted during working hours or in the patient or public areas of the Center at any time.

Employees who, in the course of their normal duties, discover canvassing or soliciting taking place, are requested immediately to report this fact to the Administrator's office.

D. The Alleged Refusal To Bargain

Apart from the allegation relating to the unilateral change in work hours of night-shift nurses aides (which I have found applied to employees on all shifts and was instituted well outside the 6-month period and therefore complaint is precluded), the complaint was amended, as noted, to allege since on or about June 11, 1980, the maintenance of a grievance procedure and the adjustment of grievances pursuant thereto without providing the Union an opportunity to be present.

The grievance procedure in effect is described in the employee policy manual. Grievances are loosely defined as questions or problems employees may have or disagreements between coworkers. When a work problem cannot be resolved by talking it over with the employee's supervisor, it can be presented in a more formal way, as a grievance. The formal procedure provides for two steps, the first a written presentation to the immediate supervisor who will arrange for a presentation to the department head. Within 3 working days of receipt of the department head's written decision, the matter, if still unresolved, may be submitted to administration which will issue a written answer within 3 working days after the discussions about the grievance have ended. While an employee may request the advice and assistance of a department head at any stage and may also be accompanied by an employee of his or her choice to help present the case, no mention is made at all of the Union, the unit employees' exclusive bargaining representative since its certification in 1976.

Baretta testified that, on several occasions during the last 6 months, satisfactory adjustments were made of employee complaints, but that at no time was a member, an officer, or a representative of the Union notified. The record contains evidence of utilization of a grievance format by several employees, including Usil Figaro who complained to Baretta about her second warning, Sandra McCadney who contacted Baretta on June 18 to report her harassment by another employee, Bolton, Goldsmith who sought to protest to Baretta her June 26 warning, and Jarvis who asked for union representation at his exit interview. On none of these occasions did Baretta inform the Union of these presentations or give the Union an opportunity to be present.

IV. CONCLUDING FINDINGS

A. The Discharge of the Nine Employees and Written Warnings and Evaluations Issued to Six of Them

Foley's case is particularly striking. Respondent clearly failed to follow its own policies by discharging her without having issued even one warning, much less three, in the 1-year period preceding her discharge, as called for by its policy.

The May 28 "warning" was very likely prepared after Foley's union activity came to Respondent's attention on DiLaurentis' phone call to the Home on June 19 since it duplicates the May 27 absence as to which Foley's received verbal counseling on June 16. The verbal counseling itself is suspect. Its belated nature, taking place 3 weeks after the event, is hardly explained by "bureaucratic delay." It preceded Foley's attendance at the union meeting by about an hour, after Baretta had learned of the meeting from employee Barger. Further, as a separate memorandum prepared to memorialize the counseling it does not conform to Respondent's normal practice of either noting the counseling on a warning slip or not recording the counseling at all. Respondent has also failed to explain why it deemed a post-holiday absence as occurring on a holiday.

Foley's special evaluation was also out of the ordinary and Raleigh's reaction to Foley's pressing questions as to her being singled out for the evaluation is suspect. Significantly, Raleigh failed to deny that Foley's discharge was related to her union activities. Her smile was a particularly odd response for a supervisor who had prepared or assisted in preparing a detailed and critical evaluation of Foley's performance as senior aide. The evaluation was *not* prepared after 6 months' service by Foley as senior aide contrary to the written notation appearing in its upper right hand corner and as checked on the form itself. A 6 month review would have ended in April 1980. Thus, Respondent chose to prepare a particularly negative special evaluation of Foley's performance at an irregular time without prior warning or consideration of counseling or other method to improve overall performance, and without any evidence supporting the alleged deficiencies it recites, immediately succeeding Foley's activities and her open participation in the Union's efforts to capitalize on its recent court victories and obtain a

bargaining agreement with the Home. I conclude that Foley's special evaluation and discharge violate the Act.

Wells was also the recipient of highly unusual treatment by Respondent. Without receiving any *pro rata* benefit of Respondent's paid sick leave policy, contrary to its own policy manual, Wells was singled out for discharge 2 days following a 1-day absence for illness which Respondent did not dispute. Again, contrary to its own policy, Wells received only one warning, the day before her discharge, which combined all her absences over a 2-year period. Thus, Wells was discharged immediately following one warning only, Respondent having failed to show whether or not Wells' absences had violated its allowable paid sick leave on a *pro rata* basis. In 1980 alone, Wells had only four absences in 6 months' time. The discharge came immediately following Wells' election as union negotiating committee member and her discussions at the Home regarding its posting of the notice. I conclude Wells' discharge was discriminatory.

Contrary to Respondent's admitted policy, *Usil Figaro* was discharged after two written warnings, the second of which was highlighted by an absence due to illness where Figaro had called in before her shift and was entitled to be paid for the day. Although Baretta discussed this second warning when Figaro protested its issuance and relieved Figaro of any obligation of producing a doctor's note, she then fired Figaro on June 21, 1 day after receipt of the Union's mailgram listing Figaro's name, among others, for the same alleged excessive absences covered by the second warning because she had "just looked over the file again and had seen Figaro was out too many times." That explanation is not believable. These circumstances warrant a finding of discriminatory discharge.

Even if Baretta's interpretation of her clash with Figaro on June 19 is credited, the circumstances related by Baretta establish an independent theory of violation. Figaro was presenting a grievance to her department head and was fired because she complained and was argumentative. Under Baretta's version, the discharge was thus made in retaliation for exercising a right protected by Section 7 of the Act even in the absence of a collective-bargaining agreement.²⁴ Strengthening the protected nature of Figaro's protest is the fact that the grievance machinery was unilaterally created by Respondent to provide a vehicle for its employees' protests. That protection adheres to Figaro's complaint irrespective of the merits of her claim or whether she referred to applicable language in the manual or was even aware of the existence of the manual or the grievance provision.²⁵ Finally, Baretta failed to demonstrate conduct on Figaro's part which would remove the Act's protection from her.²⁶

Virginia Hale, like *Foley*, *Wells*, and *Figaro*, was a member of the six-person union negotiating Committee. The weight of the evidence supports findings that the two warnings she received, dated June 26 and August 13, 1980, are discriminatory. The former, for excessive absenteeism, follows by 10 days her election to the committee and is grounded on four absences, one of which was approved by Baretta herself and others which were also acknowledged by Baretta for illness, supported by a doctor's note even though not required under Respondent's manual, and for which Hale was entitled to paid leave under the manual. The latter warning, which in part triggered Hale's discharge, encompassed six latenesses, none greater than 6 minutes and two, including the last, of 1 minute each. The conclusion is warranted upon the basis of the facts relating to Hale alone as well as the pattern of discharges relating to the union leaders among the employees that Hale's discharge, ostensibly for a combination of these absences and latenesses, shields Respondent's true motive based on her union activities. The asserted reasons for discharge can only be viewed as pretexts given the superior quality of Hale's annual evaluation issued just 2 months before her discharge and 1 day before Respondent learned of her union involvement which graded Hale high with respect to the very attributes—attendance and promptness—on which Respondent relied in terminating her.

Sandra McCadney was the fifth union committee member discharged, on June 21, 1 day after Respondent received the union mailgram with a request for her paid release to attend negotiations. McCadney successfully completed her probation period on June 12, with improvements noted in a number of areas and attendance needing improvement, then was fired 11 days later by telegram, unaccountably for continued absenteeism during her probation. Respondent relied in part on McCadney's failure to provide 4 hours' advance notice of an intended absence when that policy was not included in the manual nor provided the employees. Respondent's precipitate action with respect to McCadney can be rationally explained only by reference to its concern with her election to the union committee and the Union's request to commence negotiations 3-1/2 years after certification.

With *Annie Thomas*' firing on October 25, 1980, Respondent had rid itself of every one of the six elected union committee members. As with *Foley*, *Hale*, and *Goldsmith*, Respondent excessively delayed issuing a warning related to an alleged absence record until after it had received knowledge of her union involvement. On June 13, Thomas received a first warning, dated June 26, 10 days after her election, which lists the last absence prior thereto as June 1.²⁷ A second warning dated September 14, and given to Thomas on September 19, claims she refused to stay a half hour beyond her shift on September 14, in the face of Thomas' written statement that she did not leave which Baretta failed to investigate, although given the opportunity to do so in a talk with Thomas on the date the warning was issued. I conclude

²⁴ See *Columbia University*, 236 NLRB 793, 796 (1978); *Keokuck Gas Service Co. v. N.L.R.B.*, 580 F.2d 328, 333 (8th Cir. 1978); *Oil, Chemical and Atomic Workers International Union v. N.L.R.B.*, 547 F.2d 575, 592 (D.C. Cir. 1976).

²⁵ *John Sexton & Co., a Division of Beatrice Food Co.*, 217 NLRB 80 (1975), and cases cited at fn. 6.

²⁶ See *Crown Central Petroleum Corporation v. N.L.R.B.*, 430 F.2d 724 (5th Cir. 1970); *Thor Power Tool Company*, 148 NLRB 1379 (1964), enf'd, 351 F.2d 584 (7th Cir. 1965).

²⁷ A June 29 absence was added later.

that issuance of both of these warnings was motivated by animus toward Thomas' prominent union activities. Finally, Thomas received two additional warnings on the day of her discharge, one for absenteeism which duplicated three of five²⁸ listed absences previously included in the June 26 warning, and another for tardiness which failed to note the extent of lateness.²⁹ Respondent was creating a history of warnings against Thomas which would justify her termination—conduct which I conclude was discriminatory.

Among the remaining three dischargees, *Paula Morris*, *Helena Goldsmith*, and *David Jarvis*, two attended the union meeting (Morris and Jarvis) and the third (Goldsmith) openly supported the Union and was known as a close associate of the committee members.

At the union meeting, *Morris* nominated *Foley* and *Wells* as committee representatives from her shift. After the meeting, *Morris* spread the word of the meeting while on breaks at the Home. A few days later, 1 week short of completion of her 90-day probation, *Morris* was fired allegedly because her work was not up to par. Her only evaluation, prepared 1 week after her discharge, is just slightly below average. Respondent offered no evidence, other than what can be derived from the evaluation itself, which would serve to buttress the below average scores in the evaluation. *Morris* received no warnings, no verbal counseling, and no critical memoranda. I conclude that both her evaluation and dismissal were, indeed, discriminatory.

Goldsmith did not attend the union meeting but her expressed support for the Union was open and her friendship with committee members was well known. Within a matter of days from the Union's attempt to arrange a bargaining session and the selection of an employee committee, *Goldsmith* received a warning, on June 26. The warning, for excessive absenteeism, was issued 1 month and 20 days after the last absence on May 5, and on three of the five absences *Goldsmith* qualified for paid sick leave. I conclude that this third warning was contrived to form the basis for *Goldsmith's* discharge which shortly followed on June 30. *Baretta's* purported explanation of "bureaucracy" for the excessive delay in dealing with a number of *Goldsmith's* absences ending on May 5 has not been credited. *Baretta's* discounting of illness as a legitimate excuse for three of *Goldsmith's* absences in spite of the manual recognizing paid sick leave shows the lengths to which Respondent sought to go in manufacturing grounds for discharge shielding an unlawful motivation.

Respondent's failure to support its naked claims of additional absences by *Jarvis* after his May 17 warning until his discharge on June 23, 1 week following his participation in the union meeting, warrants the conclusion that no such absences took place. It is significant that no records were produced, nor did Respondent call any supervisor to support the claim. *Baretta* states that she ob-

served these absences but she made no record nor specified the dates or occasions on which *Jarvis* failed to work. Such records were peculiarly within Respondent's control. Furthermore, *Jarvis's* work performance was presumably being closely monitored following his suspension for an act of insubordination in early May which *Baretta* failed to explain. Under these circumstances, Respondent's failure to support by documentation or testimony any of the deficiencies reflecting the below average scores awarded *Jarvis* on his undated 6-month evaluation makes the evaluation particularly suspect. I can only infer that testimony by his supervisor at the time would not support the conclusionary evaluation.³⁰ That evaluation is in striking contrast to the superb one *Jarvis* achieved just 2 months earlier. The only reasonable explanation for such a marked change in the way *Jarvis's* work performance was viewed by the Home's administration lies in its learning shortly before the evaluation and discharge of *Jarvis's* participation in the Union's and employees' renewed efforts to induce Respondent's compliance with its longstanding bargaining obligations. I conclude that *Jarvis's* June evaluation and discharge were discriminatory.

While actual evidence of Respondent's knowledge of the participation of *Morris*, *Goldsmith*, and *Jarvis* in the Union's efforts is lacking, the circumstantial evidence supporting the conclusion that Respondent became aware of their involvement is very strong.³¹ It is undisputed that Respondent learned of the Union's scheduling of the June 16 meeting before it was held. Following the meeting and its direct knowledge of the employees' selection of a 6-member bargaining committee, everyone on the committee was discharged within a 4-month period, 4 within days of the meeting and a fifth a month later, and 8 of the approximately 15 employee participants were shortly fired. Nothing could be more devastating to the Union's and employees' efforts to exercise their bargaining status under the Act than to have the total employee committee wiped out and the majority of the interested employee adherents removed from the Home's work force.³² Bargaining rights mean little if those employees who seek to exercise and implement them are singled out for retaliation for doing so. Few if any employees may reasonably be expected to participate in the bargaining process under such circumstances. Thus, the employer like Respondent, which engages in such retaliatory conduct, if not induced to cease and to conform to the law, will continue to be able successfully to evade and avoid the bargaining obligation as it has for the past 5 years.

²⁸ See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 (1977); *Gulf Wandes Corporation*, 233 NLRB 772 (1977).

²⁹ See *Famet, Inc. v. N.L.R.B.*, 490 F.2d 293 (9th Cir. 1973); *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292 (2d Cir. 1972); *N.L.R.B. v. Minnotte Manufacturing Corp.*, 299 F.2d 695 (3d Cir. 1962).

³⁰ See *N.L.R.B. v. Treasure Lake, Inc., a subsidiary of Great Northern Development Co., Inc.*, 453 F.2d 202 (3d Cir. 1971); *N.L.R.B. v. Nabors d/b/a W. C. Nabors Company*, 196 F.2d 272 (5th Cir. 1952), cert. denied 344 U.S. 865; *N.L.R.B. v. Electric City Dyeing Co.*, 178 F.2d 980 (3d Cir. 1950).

²⁸ For all Respondent knew the two absences unrelated to the June 26 warning may have been for illness for which Thomas would have been entitled to paid leave as applied *pro rata* to her as a regular part-time employee.

²⁹ This contrasts with the late clockings to the minute noted on Hale's warnings.

This pattern of discharge of all of the strongest union adherents has been coupled on this record with a pattern of extraordinary delay in requiring employee accountability for absences and latenesses, extending to a date after respondent learned of the employee's union activities. Such delay warrants the conclusion that Respondent condoned the conduct which ultimately formed the basis of the belated warnings and irregular evaluations. Respondent's inconsistent exercise of its authority, in both following and disregarding the standards and criteria it alone established for determining when and under what circumstances discipline or discharge is warranted, further buttresses the other evidence that it was discriminatorily motivated when it selected only the union leaders for retaliation.³³

Respondent's animus to the Union's efforts to implement its certification and achieve collective bargaining is well documented and supported by the history of its past violations of the Act, even putting aside the settlement disposition of the one case in which the Regional Office agreed to an exculpatory clause.³⁴

These factors of animus, timing, and pretexts in relating reasons for their separations support the conclusion, which I reach, that Respondent learned of the union involvement of Morris, Jarvis, and Goldsmith and discharged them along with the other six, in violation of Section 8(a)(1) and (3) of the Act.

Even if knowledge of the union activities of Morris, Goldsmith, and Jarvis may not be inferred under all of the circumstances disclosed by the record, I nonetheless conclude that their discharges have violated the Act. Since Respondent's knowledge of the leading union roles undertaken by the six other discriminatees was a matter of clear-cut documentary proof, only by coupling their discharges with those of other employees where direct evidence of knowledge is lacking could Respondent hope to provide an aura of legitimacy to its personnel actions. In the alternative, I am satisfied that Respondent discharged the aforementioned three employees with the other six "in order to strengthen its contention that it was motivated solely by legitimate business reasons and not by the desire to rid itself of a union proponent."³⁵

That the General Counsel has established *prima facie* violations of Section 8(a)(1) and (3) of the Act as to the nine employees is evident from a review of the foregoing facts and findings. It is also apparent from a review of the same material that Respondent has failed to demonstrate, as an affirmative defense, that the decision to terminate any of them would have been the same in the absence of their protected conduct. Accordingly, applying

the Board's *Wright Line*³⁶ test, I conclude that Respondent was unlawfully motivated in discharging each of the nine employees named in the complaint, and that it has thereby violated Section 8(a)(1) and (3) of the Act.

2. Respondent's no-solicitation/no-distribution rule

In spite of the Union's status as exclusive bargaining representative since 1976, the record demonstrates the fragility of that status in the face of a determined and hostile employer and the high degree of employee turnover. Thus, Respondent's rules severely restricting union solicitation and distribution are of more than passing interest. There is no evidence that the rules at issue here have been applied to the Union's renewed efforts among the Home's employees commencing in June 1980. Therefore, and as alleged, they will be examined only as to whether as written they interfere with Section 7 rights.

As noted by the Board in its recent decision in *Eastern Maine Medical Center*, 253 NLRB 224 (1980), the Supreme Court in *Beth Israel*³⁷ has approved its presumption that employer rules which prohibit employee solicitation in health care facilities in areas other than immediate patient care areas are invalid. That presumption does no more than place on the facility the burden of proving, with respect to areas to which it applies, that union solicitation may adversely affect patients.³⁸

Respondent's rule is neither limited to work areas of the Home, nor is it restricted to working time. By using the phrase "working hours," the no-solicitation rule is *prima facie* susceptible of the interpretation that solicitation is prohibited during all business hours—all hours of the day at the Home—and, thus, invalid.³⁹ Respondent has failed to make any attempt to show that the phrase "working hours" refers to working time only and permits solicitation on break or other free periods. Similarly, Respondent has made no attempt to show that prohibiting solicitations in the "public areas of the Center" adversely affects patients. Furthermore, by its terms the distribution portion of the rule requiring management's prior approval to distribute any written matter on the Home's property presumptively abridges valid distribution on the employees' own time away from patient care areas.⁴⁰ Respondent has failed to make any showing that this restriction is necessary for proper patient care or that it disturbs patients. Therefore, this blanket restraint also interferes with employee Section 7 rights.⁴¹

3. Respondent's refusal to bargain

The evidence supports the conclusion, and I find, that, without consulting or notifying the Union as collective-bargaining representative, Respondent maintained a unilaterally established grievance procedure, which employ-

³³ Significantly, while conclusionary testimony regarding significant turnover of employees is included in the record, Respondent failed to adduce any evidence in its defense that any employees, other than these 9 outstanding union advocates, were involuntarily terminated in a unit of more than 80 employees during the period from June 21 to September or October 1980. Absent such evidence, the records shows only these nine discharges during that period.

³⁴ See *N.L.R.B. v. Jack LaLanne Management Corp.*, 539 F.2d 292 (2d Cir. 1976); *N.L.R.B. v. Eagle Material Handling, Inc., a subsidiary of Somerset Tire Service, Inc., etc.*, 558 F.2d 160 (3d Cir. 1977).

³⁵ *Armcor Industries, Inc.*, 217 NLRB 358 (1975), *enfd.* 535 F.2d 239, 243, fn. 7 (3d Cir. 1976). See also *Wm. Chalson & Co., Inc.*, 252 NLRB 25 (1980).

³⁶ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

³⁷ *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483 (1978).

³⁸ *N.L.R.B. v. Baptist Hospital, Inc.*, 442 U.S. 773, 781 (1979).

³⁹ *Essex International, Inc.*, 211 NLRB 749, 750 (1974).

⁴⁰ This restriction reaches, e.g., the employees' circulation at the Home of copies of the notice form attached to the circuit court of appeals decision provided employees at the June 16, 1980, meeting.

⁴¹ *Wayne Home Equipment Company, Inc.*, 229 NLRB 654 (1977), and cases cited at 657.

ees sought to utilize at least with respect to disciplinary procedures and working conditions, and "adjusted" work problems, including those concerned with disciplinary matters. Respondent has thus independently violated Section 8(a)(5) and (1) of the Act by soliciting and adjusting grievances through the grievance procedure contained in its employee policy manual without providing the Union an opportunity to be present at the adjustment.⁴²

CONCLUSIONS OF LAW

1. Wellington Hall Nursing Home, Inc., is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Usil Figaro on June 21, 1980; discharging Sandra McCadney on June 21, 1980; issuing a written evaluation on June 21, 1980, and discharging Paula Morris on June 21, 1980; discharging Lois Wells on June 22, 1980; issuing a written evaluation on June 20, 1980, and discharging David Jarvis on June 23, 1980; issuing a written evaluation on June 27, 1980, and discharging Elizabeth Foley on June 27, 1980; issuing a written warning on June 26, 1980, and discharging Helena Goldsmith on June 30, 1980; issuing written warnings on June 26 and August 13, 1980, and discharging Virginia Hale on August 27, 1980; and issuing written warnings on July 13, September 19, and October 25, 1980, and discharging Annie Thomas on October 25, 1980, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By maintaining invalid no-solicitation and no-distribution rules, Respondent violated Section 8(a)(1) of the Act.

5. By soliciting and adjusting employee grievances without providing the Union an opportunity to be present at the adjustment, Respondent violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has committed no unfair labor practices affecting commerce alleged in the complaint except as set out above.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Inasmuch as Respondent has demonstrated that it has a proclivity to violate the Act even after its actions have been adjudicated unlawful, I find it appropriate to recommend a broad order requiring Respondent to cease and desist from "in any other manner," interfering with, restraining, or coercing employees in the exercise of their Section 7 rights to organize and bargain collective-

ly or to refrain from such activities.⁴³ Affirmative actions shall include the posting of the usual information notice to employees, the expunging of the unlawfully issued warnings and evaluations from Respondent's personnel records and files, offers of reinstatement to the nine named employees to their former jobs or, if no longer available, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and making them whole for any losses of earnings or other monetary losses they may have suffered as a result of the discriminations against them in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on other grounds 322 F.2d 913 (9th Cir. 1963).

I shall also recommend that Respondent be restrained from maintaining unlawful no-solicitation and no-distribution rules or from adjusting employee grievances pursuant to the grievance procedure contained in its employee policy manual.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁴⁴

The Respondent, Wellington Hall Nursing Home, Inc., Hackensacks, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing written warnings or evaluations, discharging or otherwise discriminating against employees in regard to their hire, tenure of employment, or other terms and conditions of employment in order to discourage membership in or support of 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, or any other labor organization.

(b) Promulgating or maintaining any rule or regulation prohibiting its employees, when they are on nonworking time, from distributing handbills or similar literature on behalf of, or from soliciting other employees to support, 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, or any other labor organization in areas other than immediate patient care areas on the Home's premises.

(c) Instituting and maintaining a procedure to solicit bargaining unit grievances and to adjust bargaining unit

⁴³ See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Neither the General Counsel nor the Union has requested any special or extraordinary remedies so as to overcome what appear to be particularly outrageous and pervasive violations of the Act. I have accordingly refrained from incorporating in my recommended remedy any additional remedies of such nature other than the broad form cease-and-desist order.

⁴⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁴² *The Dow Chemical Company*, 227 NLRB 1005 (1977).

grievances, without giving the Union an opportunity to be present at the adjustment.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Usil Figaro, Sandra McCadney, Paula Morris, Lois Wells, David Jarvis, Elizabeth Foley, Helena Goldsmith, Virginia Hale, and Annie Thomas immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole in the manner described in the section of this Decision entitled "The Remedy."

(b) Rescind and expunge from all personnel records and files, and any other records, all copies of the written warnings issued to Virginia Hale on June 26 and August 13, 1980, Helena Goldsmith on June 26, 1980, Annie Thomas on July 13, September 19, and October 25, 1980, and all copies of the written evaluations issued to David Jarvis on June 20, 1980, Paula Morris on June 21, 1980, and Elizabeth Foley on June 27, 1980.

(c) Rescind its rules restricting the areas and times in which employees may solicit or distribute handbills or related materials on behalf of labor organizations as they apply to times other than working time and to areas other than immediate patient care areas.

(d) Discontinue the grievance procedure described in the employee policy manual as it applies to employees in the bargaining unit represented by 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its nursing home facility in Hackensack, New Jersey, copies of the attached notice marked "Appendix."⁴⁵ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by representative of Respondent, shall be posted by immediately upon receipt thereof, and be maintained by for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent violated the Act in ways not specifically found herein.

⁴⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."